

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Dublin Division

IN RE:)	Chapter 11 Case
)	Number <u>91-30250</u>
WILLIAM T. BOND, SR.)	
WYNELL BOND))	
)	
Debtors)	
_____))	
WILLIAM T. BOND, SR.)	Filed
WYNELL BOND))	
at 4 O'clock & 21 min. PM)	Date: 12-13-91
Plaintiffs)	
)	
vs.)	Adversary Proceeding
)	Number <u>91-3011</u>
JAN WEST)	
d/b/a JAN WEST REALTY)	
)	
Defendant)	

ORDER

Plaintiffs, William T. Bond, Sr. and Wynell Bond, the debtors-in-possession in the underlying Chapter 11 case, move the court for summary judgment in this adversary action on their complaint against defendant Jan West, d/b/a Jan West Realty. The facts relevant to resolution of plaintiffs' motion are not in dispute. Plaintiffs filed their Chapter 11 petition on June 27, 1991. Plaintiffs brought this adversary action pursuant to 11 U.S.C. §547(b) seeking to avoid a judgment lien obtained by defendant in connection with a money judgment for Twenty-Seven

Thousand and No/100 (\$27,000.00) Dollars entered by the Superior Court of Dodge County, Georgia ("the judgment") on April 16, 1991. Defendant admits obtaining the judgment lien against plaintiffs on April 16, 1991. Plaintiffs seek in their

complaint not only that defendant's judgment lien be avoided pursuant to §547(b), but that the judgment of the Superior Court be declared null and void. Defendant opposes plaintiffs' motion.

MEMORANDUM OF LAW

Federal Rule of Civil Procedure ("FRCP") 56(a), made applicable to adversary proceedings by Bankruptcy Rule 7056, provides that "[a] party seeking to recover upon a claim . . . may . . . move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof." Summary judgment should be granted for the moving party only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter law." FRCP 56(c). In responding to a motion for summary judgment, the party opposing the motion "may not rest upon the mere allegations or denials of the [opposing] party's pleading, but the [opposing] party's response . . . must set forth specific facts showing that there is a genuine issue for trial." FRCP 56(e). See generally Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.E.2d 265 (1986); Cowan v. J.C. Penny

Co., Inc., 790 F.2d 1529 (11th Cir. 1986). "To prevail on a motion for summary judgment, [the movant] must prove there is no dispute as to any material fact and based on the material facts, to which the parties are in agreement, [the movant] is entitled to judgment as a matter of law." Haile v. Reynolds Tobacco Co., et al. (In re: Haile Co.), Ch. 11 case No. 88-40864 Adv. 90-4118 at p. 5 (Bankr. S.D. Ga. Dalis, J. Sept, 27, 1991). "In determining whether the movant has met its burden, the reviewing court must examine the evidence in a light most favorable to the opponent of the motion. All reasonable doubts and inferences should be resolved in favor of the opponent [to the summary judgment motion]." Amey, Inc. v. Gulf Abstract and Title, Inc., 758 F.2d 1486, 1502 (11th Cir. 1985) (citations omitted), cert. denied, 475 U.S. 1107, 106 S.Ct. 1513, 89 L.E.2d 912 (1986). See also Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.E.2d 142 (1970).

In support of their motion, plaintiffs submit a copy of the judgment, certification of the judgment by the Clerk of the Superior Court of Dodge County, a copy of plaintiffs' bankruptcy petition filed June 27, 1991, and the affidavit of plaintiff Wynell Bond stating that plaintiffs were insolvent on April 16, 1991, the date the judgment was entered. Defendant submitted no additional evidence with her brief in opposition. Defendant admits in her answer to plaintiffs' complaint that she obtained a judgment lien against plaintiffs on April 16, 1991, but denies plaintiffs were insolvent and that the judgment lien is avoidable under §547(b).

Section 547(b) provides:

Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property-

- (1) to or for the benefit of a creditor;
- (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
- (3) made while the debtor was insolvent;
- (4) made--

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if-

(A) the case where a case under chapter of this title [11];

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. §547(b).

Under §547(b), plaintiffs may avoid defendant's judgment lien as a preferential transfer as a matter of law if the undisputed facts establish that the judgment lien 1) constitutes a "transfer" within the meaning of §547(b), 2) for defendant's benefit, 3) on account of an antecedent debt, 4) while plaintiffs were insolvent, 5) on or within 90 days prior to plaintiffs' Chapter 11 filing, and 6) allowed defendant to recover more than she would in a Chapter 7

liquidation. Plaintiffs must establish all elements of their cause of action under 11 U.S.C. §547(b) to prevail on their motion for summary judgment. See In re: Lifchitz, 131 B.R. 827 (Bankr. N.D. Ill. 1991).

1. TRANSFER OF AN INTEREST OF THE DEBTOR IN PROPERTY.

The Bankruptcy Code defines "transfer" as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption." 11 U.S.C. §101(58). Obtaining a judgment lien comes within this definition of a "transfer" for purposes of lien avoidance pursuant to §547(b). In re: Hagen, 922 F.2d 742, 745 (11th Cir. 1991).

2. TO OR FOR THE BENEFIT OF A CREDITOR

There is no question that the judgment lien is for the benefit of defendant.

3. ANTECEDENT DEBT

Defendant necessarily became a creditor "by virtue of [her] claim having arisen at some time prior to the filing of the lawsuit which resulted in the judgment." In re: Bates, 35 B.R. 5, 6 (Bankr. S.C. 1983), and therefore her claim is on account of an antecedent debt owed by the plaintiffs.

4. MADE WHILE THE DEBTOR WAS INSOLVENT

Under section 547(f)¹ a debtor is presumed insolvent for 90 days prior to filing his bankruptcy petition. Plaintiffs filed their Chapter 11 petition on June 27, 1991. Defendant obtained her judgment lien April 16, 1991, less than 90

¹Section 547(f) provides that "the debtor is presumed to have been insolvent on and during the 90 days immediately proceeding the date of the filing of the petition."

days before plaintiffs filed their Chapter 11 petition. Although defendant denies plaintiffs were insolvent on the date she obtained the judgment lien (answer para. 4), she submits no evidence in support of her denial. Defendant's mere denial of insolvency is insufficient to rebut the presumption of insolvency created by §547(f). McNeely v. Hutchinson Financial Corp. (In re: McNeely), Ch. 11 case No. 686-00172 Adv. 687-0008 at pp. 11-12 (Bankr. S.D. Ga. Dalis, J. Dec. 19, 1987); Lifchitz, supra, at 834. Therefore, the transfer was made while plaintiffs were insolvent.

5. MADE ON OR WITHIN 90 DAYS BEFORE THE DATE
OF FILING THE PETITION; OR BETWEEN 90 DAYS AND ONE YEAR
IN THE CASE OF AN INSIDER

Defendant does not dispute that plaintiffs filed their Chapter 11 petition on June 27, 1991 or that the judgment lien was obtained April 16, 1991, less than 90 days before plaintiffs filed for bankruptcy.

6. THAT ENABLES SUCH CREDITOR TO RECEIVE MORE THAN
SUCH CREDITOR WOULD RECEIVE IN A CHAPTER 7 LIQUIDATION

The debtor is presumed insolvent under §547(f) and the mere denial of insolvency by the defendant is insufficient to rebut the presumption. Plaintiffs may rely upon this presumption in their motion for summary judgment. "Insolvent" is defined in 11 U.S.C. §101(32), applicable to these individual debtors, to mean a

financial condition such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation, exclusive of-

- (i) property transferred, concealed, or removed with intent to hinder, delay, or defraud such entity's creditors; and
- (ii) property that may be exempted from property of the estate under section 522 of this title [11]

11 U.S.C. §101(32) (A).

Where, as here, plaintiffs are presumed to be insolvent and insolvency means that there is insufficient value in assets to pay all debts in full, the unsecured creditors would receive less than a full payment in a hypothetical liquidation.

"[T]he transfer of any security interest that converts an unsecured creditor into a secured creditor does enable that creditor to receive a greater percentage of its claim than other creditors in the same class." Deel Rent-A-Car, Inc. v. Levine, 16 B.R. 873, 875 (D. S.D. Fla. 1982), aff'd, 721 F.2d 750 (11th Cir. 1983). Accord Bates, supra, at 7; In re: Zackman Homes, Inc., 40 B.R. 171, 173 (Bankr. D. Minn. 1984); In re: Carpenter, 56 B.R. 704, 707 (Bankr. D. R.I. 1986). "Any transfer which diminishes or depletes the bankruptcy estate may be seen as a transfer which enables a creditor to receive more than other creditors of equal status and therefore is a preferential transfer." In re: Zackman Homes, Inc., supra, at 173. Defendant's judgment lien improved her position to that of a secured creditor, 11 U.S.C. §506(a),² which enables defendant to receive more than she would in a Chapter 7 pro rata distribution as an unsecured creditor from these "insolvent" debtors.

Based on the pleadings and the additional evidence submitted by plaintiffs, there is no genuine issue as to any fact material to the resolution of this adversary action. Plaintiffs have established as a matter of law that defendant's judgment lien is a preferential transfer under 547(b). However, 547(b) does not confer on this court the power or authority to declare the judgment of a state court null and void as plaintiffs seek in their complaint. The judgment of the Superior Court for the County of Dodge, Georgia is a final determination of liability entitled to full faith and credit, Art. IV, Sec. 1 United States Constitution, and cannot be disturbed by this court. Underwriters Nat. Assur. Co. v. N.C. Life and Acc. and Health Ins. Guaranty Ass'n, 455 U.S. 691, 704, 102 S.Ct. 1357, 1365, 71 L.E.2d 558 (1982). The judgment establishes the

²Section 506(a) provides that "[a]n allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to extent of the value of such creditor's interest in the estate's interest in such property. . . ."

debt, the amount of the allowable claim. Although under §547(b) defendant's lien can be avoided, defendant retains an unsecured claim in the underlying Chapter 11 case based on the superior court judgment.

It is therefore ORDERED that plaintiffs' motion for summary judgment is granted to the extent that defendant's judgment lien based on the money judgment entered on April 16, 1991 by the Superior Court of Dodge County, Georgia is avoided pursuant to 11 U.S.C. §547(b) and judgment shall issue accordingly;

further ORDERED that trial of this adversary proceeding, previously set for December 30, 1991, is vacated.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 13th day of December, 1991.